APPEAL NO. 92154

On March 17, 1992, a contested case hearing was held in (city), Texas, pursuant to the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), with (hearing officer) presiding, to consider the two disputed issues as agreed to by the parties, namely, whether appellant provided (Employer) with timely notice of his injury and, if so, "whether or not [appellant's] present disability is a result of a new injury, or whether it's the result of a previous condition." The hearing officer concluded that appellant did not timely notify Employer of a work-related injury and that Employer and respondent were, accordingly, relieved of liability under the 1989 Act for an injury to appellant's right arm. Appellant challenges the sufficiency of the evidence to support those two conclusions as well as certain related findings of fact. Appellant also asserts that the hearing officer failed to address the second issue, that is: "whether or not claimant's injury was a new condition separate from his old injury." Appellant requests that we reverse the hearing officer's decision and either render a decision for appellant or remand the matter for a new hearing. Respondent requests affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions and finding no reversible error, we affirm.

The 1989 Act provides that an employee shall notify the employer of an injury "not later than the 30th day after the date on which the injury occurs" and, that if an injury is an occupational disease (including repetitive trauma injury), the notice shall be provided not later than the 30th day after the date on which the employee knew or should have known the injury may be related to the employment. The notice may be given to any employee who holds a supervisory or management position with the employer. Article 8308-5.01 (1989 Act). An employee's failure to so notify the employer relieves the employer and its insurance carrier of liability under the 1989 Act unless (l) the employer has actual knowledge of the injury; (2) the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to give timely notice; or (3) the employer or insurance carrier do not contest the claim. Article 8308-5.02.

Appellant's testimony and the medical records of his treating doctor, (Dr. B), M.D., a plastic surgeon, indicated that appellant initially sustained an injury on or about (date of injury), when a steel beam fell on his right hand and wrist while at work for Employer. He was the "pickup manager" for Employer and in charge of shipping and receiving. His duties could include unloading trucks and reworking stock depending upon the number of employees available. He said he did a lot of loading and unloading. After the incident with the falling steel beam on (date of injury), Dr. B performed surgery on April 27th to excise two ganglion cysts from appellant's right wrist. On August 3, 1988, Dr. B performed additional surgery to remove a recurrent ganglion cyst from appellant's right wrist. On December 19, 1990, following a diagnosis of carpal tunnel syndrome of the right wrist, Dr. B operated on appellant's right wrist to decompress the median and ulnar nerves.

On July 18, 1991, appellant consulted Dr. B for pain in his right arm above and below the elbow and for weakness in that arm and was sent to (Dr. M), M.D., for consultation and electromyographic studies. Dr. M's report of July 24, 1991, contained the comment that appellant had "the complaint of right upper extremity pain dating to an injury he states he sustained in (date of injury) at his place of employment. The patient relates having been struck by a falling object over the right forearm and wrist with the subsequent development of a cyst-like mass over the dorsum of the [right] hand." According to Dr. M's report to Dr. B, his "impression" was "abnormal EMG" and the electromyographic findings were consistent with: "1. PRONATOR SYNDROME on the right, chronic and moderate to severe in nature . . . [and] 2. CUBITAL TUNNEL SYNDROME on the right, chronic and moderately severe." According to Dr. B's records, consistent with his diagnosis of "cubital tunnel syndrome" and "pronator teres syndrome," Dr. B performed surgery for the exploration and decompression of the ulnar and median nerves in appellant's right upper arm and forearm on August 14, 1991.

Appellant asserted in opening and closing statements, and in examination of his supervisor, that appellant was relying on "the theory of repetitive trauma injury." Appellant advanced the theory in his opening statement, but not in testimony, that he continued to work while trying to recover from the prior injury--apparently the carpal tunnel syndrome surgery--and that the new injury was caused by his "actually not being allowed to recover from his previous injury." Respondent's theory was that the August 1991 surgery on appellant's median and ulnar nerves was simply a continuation of the original injury. Article 8308-1.03(39) defines repetitive trauma injury as damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. The hearing officer in his "Discussion" stated: "I do not find that the facts in this case support this argument. The Claimant's testimony and prior statements fail to support any theory that this injury may have been caused by repetitive trauma to his arm. The extensive medical reports from different medical authorities also fail to raise this as an issue." We do not disagree with that assessment.

Concerning the notice issue, at the hearing appellant seemed to rely on the oral notice he said he provided to Employer prior to his August 1991 surgery. This was in contrast to his request for review which focuses on a written notice of injury signed by appellant on August 26, 1991. Appellant testified he gave JR, Employer's store director and his supervisor, a note from Dr. B indicating appellant was to see Dr. M on July 24th to have his upper right extremity tested. Appellant said he told Mr. R at that time that he was going to Dr. M to have his "upper extremity tested" and that he still had "weakness in my arm" to which Mr. R responded, "okay." Appellant stated that he didn't know for sure on July 18th when he visited Dr. B, or on July 24th when he visited Dr. M, whether he had a new injury. He said he had had weakness in the arm "but not to that significance before;" that the weakness wasn't just down in the wrist but involved his entire arm; and, that the

pain was different than before and was "in the muscle."

Appellant, a supervisor himself, was familiar with Employer's workers' compensation claims procedures and the requirement for filling out incident statements for injuries. He never prepared such a report on himself regarding his new injury nor did he ask anyone else to do so. Appellant testified he told Employer of his new injury sometime after Dr. B had him return to discuss Dr. M's July 24th report. This would have occurred sometime between July 24th and August 13th. Appellant said that after returning from Dr. B's office he told Mr. R, "its not my wrist, the doctor said I've got to have surgery up in this part of the arm." He said he told Employer he needed to have surgery on the elbow portion of his arm because he had a loss of strength in the arm and had to have both nerves around the elbow decompressed. Appellant asserted that this was his "notice" of his new injury to Employer and said he did not tell Employer anything else.

In addition to the note from Dr. B (not in evidence) and the oral notice appellant testified he gave to JR, appellant also signed a written notice of injury form on August 26, 1991. Respondent, in its case, introduced that form, a Notice of Injury and Claim for Compensation (written injury notice), which stated appellant's date of injury as "8/13/91" and that appellant's first knowledge his injury was work related was August 13, 1991.

Appellant stated he had received continuous treatment from Dr. B from the time of the (date of injury) and that his complaints always involved his right arm, albeit different parts of that arm. Appellant was aware that all of his medical expenses had been and were being paid for by Employer's insurance carriers pursuant to his original claim. Respondent averred without objection that it had been paying for appellant's medical expenses since his 1988 event, apparently referring to the operation by Dr. B on August 3, 1988, for the recurrent ganglion cyst. In his request for review appellant states that he filed for and was awarded compensation benefits in (date of injury) and again in 1990 for work-related injuries to his right arm. He testified, however, he was never "required" to fill out any report for Employer subsequent to the original (date of injury) injury and, that while he regarded the carpal tunnel syndrome surgery in December 1990 as a "new injury," he didn't submit a new claim for that injury.

In addition to his testimony, appellant adduced a letter from Dr. B, dated October 29. 1991, which stated that appellant's problems at the elbow are unrelated to his previous wrist problems, are "a separate and new condition," and are "a work related injury, therefore he is entitled to workers' compensation benefits from 8/14/1991." Appellant said he solicited the letter from Dr. B after having been denied workers' compensation benefits. He conceded he told Dr. B that his injury wouldn't qualify for workers' compensation benefits unless it was a separate injury although he didn't ask Dr. B to make the statement that he was eligible for benefits.

JR testified appellant never reported a new injury to him. Rather, appellant

mentioned his continuing problems with his right arm and Mr. R got "the impression it was the same problem he's had for the last several years." In fact, appellant had complained of problems with his right arm for the five to six years Mr. R had worked with him. He acknowledged being given a note by appellant who said he was going to another doctor as he was having continuing problems with his arm which was weak. Mr. R first learned that appellant was contending he sustained a new injury sometime late in September 1991, possibly the 23rd or 24th, when an assistant store director called to ask what Mr. R knew about it. After this call Mr. R then filled out an incident statement.

Respondent introduced an Employer's First Report of Injury or Illness (TWCC-1), dated September 27, 1991, which listed the date of injury as August 13, 1991, disclaimed any knowledge of how the injury occurred, stated the date reported as "9-26-91" and showed the "Workers' Compensation Insurance Company" as Travelers Insurance Company.

In his request for review appellant focused his argument on his provision of timely notice on his August 26th written injury notice. Appellant attached as exhibits to his request for review copies of a contract with his attorney, dated August 26, 1991, and a copy of a letter, dated August 26, 1991, from appellant's counsel to "Traveler's Insurance Co." transmitting his written injury notice. This letter asserted the date of injury as being "on or about" August 13, 1991, and reflected that a copy was sent to the "Texas Industrial Accident Board - Austin." Appellant also attached copies of a "Receipt for Certified Mail" with a postal date stamp of September 11, 1991, and a "Domestic Return Receipt" or "green card" showing delivery to Travelers' Insurance Co. on September 13, 1991. The transmittal letter and postal receipts all bore the same identifying number. Of these documents, however, only appellant's August 26th written injury notice had been admitted into evidence at the hearing. Appellant argues on appeal that after his arm surgery on August 13th, he notified his employer and "their insurance carrier" of the new injury and that the written injury notice and attorney's contract were sent to the Commission and "the carrier, Travelers Insurance, on September 11, 1991." Appellant urges that the certified mail receipt indicates that the Commission and the insurance carrier became aware of the new injury and claim on September 13th and "[t]here is no doubt therefore that the insurance carrier was very much aware of [appellant's] new claim within the statutorily mandated 30-day period." Appellant essentially posits that his letter and the "green card" attached to his request for review establish that the "insurance carrier," the Commission, and Employer all received notice of his new injury on September 13th, notwithstanding that Employer was not shown on the letter as an addressee and that the record does not reflect the relationship between Travelers Insurance Co. and Employer, if any. Though not articulated, appellant apparently assumes that notice to a carrier is, *ipso facto*, notice to an employer. Appellant further posits that such notice to these three entities was "within 30 days" after the injury, apparently concluding that since the new injury date was August 13th and since the green card showed that Traveler's Insurance Co. received the letter with the injury notice on September 13th, that such time period was "within 30 days." Article 8308-5.01 requires notice of injury to the employer, not "within 30 days," but rather "not later than the 30th day after the date on

which the injury occurs." September 13th was the 31st day after August 13th, the date appellant insisted upon as the date of injury.

We have noted in prior decisions that our review is limited to the record developed at the hearing (Article 8308-6.42(a)) and we have rejected exhibits first tendered on appeal. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. HO-91-136258-01-CC-BC41) decided April 27, 1992; and, Texas Workers' Compensation Commission Appeal No. 92156 (Docket No. HO-92059648-01-CC-HO41) decided June 1, 1992. We decline to consider appellant's documents which were not a part of the record developed at the hearing. In so doing, we observe that appellant did not show, nor could he, that he only acquired knowledge of such documents after the hearing on March 17, 1992; that the information in the documents would probably produce a different result; or, that it was not a want of diligence that kept appellant from earlier learning of the documents. Even were we to consider such documents, however, they would show that while appellant's written injury notice was signed and dated August 26th, as was the transmittal letter to Travelers Insurance Co., the documents were not post-stamped in the mail system until September 11th and not received by Travelers Insurance Co. until September 13th, a date later than 30 days after the August 13th date of injury. Further, the correspondence was addressed to Travelers Insurance Co., not to Employer; Employer was not shown as the recipient of a copy; and, nowhere in the record is there any indication of the relationship between Employer and Travelers Insurance Co. There is simply no evidence that Employer received appellant's written injury notice not later than 30 days after August 13th or 14th. Even if appellant had intended to use August 14th as his date of injury--the date indicated in Dr. B's records--there is no evidence his written injury notice was received by Employer not later than 30 days after such date.

The following findings of fact are germane to our review of this case:

3.Claimant had surgery to his right arm on August 13, 1991.

4.On August 13, 1991, Claimant knew or should have known that the surgery performed on his right arm on August 13, 1991, was required because of a new work-related injury or occupational disease or the work-related aggravation of a previous injury or occupational disease.

5.Claimant failed to notify his employer not later than the 30th day after August 13, 1991, that he considered the August 13, 1991, surgery to be required because of a new work-related injury or occupational disease or the work-related aggravation of a previous injury or occupational disease.

6.The Employer and the Carrier did not have actual knowledge that Claimant considered the August 13, 1991, surgery to be caused by a new work-related injury or occupational disease or the work-related aggravation

of a previous injury or occupational disease until after September 22, 1991.

7.Claimant's failure to give timely notice of a new work-related injury or occupational disease or the work-related aggravation of a previous injury or occupational disease was not for good cause.

8.Claimant did not establish that he was involved in a work-related injury or occupational disease or that he had a work-related aggravation of a previous injury or occupational disease in July or August, 1991.

Appellant asserts the hearing officer erred in concluding as a matter of law that appellant failed to timely notify Employer of a work-related injury, erred in finding that appellant failed to notify Employer within 30 days after August 13, 1991, erred in reaching Finding of Fact Nos. 7 and 8, and erred in failing to address the other disputed issue, namely, "whether or not claimant's injury was a new condition separate from his old injury."

Appellant's testimony as well as his written notice of injury seemed to equate the date of his new injury with the date of his most recent surgery and to state such date as August 13th. Appellant's theory was that at least by the date of such surgery he knew he had a new injury in the nature of a repetitive trauma injury to his right arm in the area of the elbow. In his request for review, appellant states that "because of the nature of [appellant's] injury it is almost impossible to say for certain the date of the injury. That being the case, the date surgery was performed on his right elbow is generally taken as the date of the new injury." It appears as though the parties and the hearing officer all proceeded on the assumption that the date of appellant's surgery on the elbow area of his right arm was August 13, 1991, whereas Dr. B's records reflect the date as August 14th. The hearing officer specifically found such to be the case in Finding of Fact No. 3 and recited such date in his discussion of the evidence. The Benefit Review Conference Report in evidence stated the date of injury as "8/13/91." Appellant testified to and in his request for review asserted the date of his surgery as August 13th. This apparent discrepancy, however, is not critical to our resolution of this appeal.

There is sufficient probative evidence to support the hearing officer's findings that appellant failed to timely notify Employer of his claimed injury and that neither Employer nor the carrier had actual knowledge that appellant considered his August 13th surgery to have been caused by a new work-related injury until after September 22, 1991, a date more than 30 days after August 13th and 14th. The hearing officer is the sole judge of the weight and credibility to be given the evidence under Article 8308-6.34(c) (1989 Act). Thus he was empowered to find from the testimony of appellant and Mr. R that appellant's statements to Mr. R prior to his August 1991 surgery did not provide Employer with the notice of a work-related injury required by Article 8308-5.01. The Texas Supreme Court has said that the

purpose of the notice requirement is to give the insurer an opportunity to immediately investigate the facts surrounding an injury and that to fulfill the purpose of such notice the employer need only know the general nature of the injury and the fact that it is job related since more details will be supplied by the claim. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The conflict in the testimony of appellant and Mr. R concerning the provision of notice of a new injury created a fact question for the hearing officer to resolve. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Even were Mr. R to have perceived from appellant's statements that he had sustained a new right arm injury involving the median and ulnar nerves previously operated on in the wrist area in December 1990, appellant apparently said nothing to indicate such new injury was work related. The notice of injury must give notice to the employer that the condition is work related. Mathes v. Texas Employers' Insurance Association, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). To be compensable under the 1989 Act an injury must arise out of and in the course and scope of employment. Article 8308-1.03(10). We believe it was reasonable for Mr. R to conclude from appellant's statements, as he did, that appellant was merely voicing complaints or continuing problems related to the prior injury to his arm and was not notifying Employer of a new injury.

We cannot agree with appellant that he provided timely notice of his injury to Employer with his August 26 written injury notice. There was no evidence to show when Employer may have received a copy of such document if indeed it ever did. The evidence did not show that Employer was notified that appellant was claiming a new injury prior to late September 1991. Mr. R testified it was in late September that he received the inquiry about appellant's claim of a new injury, possibly September 23rd or 24th. This testimony would account for the September 22nd date in Finding of Fact No. 6. The Employer's First Report of Injury stated Employer was notified on September 26th.

Appellant has challenged Finding of Fact No. 7 concerning the absence of "good cause" for his failure to provide timely notice notwithstanding that at the hearing appellant didn't assert that theory, presented no evidence concerning good cause as such, and insisted, rather, that he had provided timely notice. In his request for review appellant supports this challenge by asserting that it was difficult to ascertain a date of injury given the nature of appellant's injury, to wit: repetitive trauma; that the date of his surgery, August 13th, "is generally taken as the date of the new injury;" and, that the evidence shows Employer and the carrier were notified within 30 days of August 13th. Article 8308-4.14 provides that the date of an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. This argument marshals no evidence in support of appellant's good cause notion and its points have already been discussed.

Appellant next urges that "[t]he second issue, which claimant considers of paramount importance, is whether the injury is new or an aggravation of the old injury" and says the

hearing officer "failed to rule categorically on the condition of claimant's injury of August 13, 1991." We find the plain language of the hearing officer's Finding of Fact No. 8 does indeed address the second disputed issue.

Appellant also asserts that "the Hearing Officer's decision that claimant take nothing as a result of his claim is unconscionable, arbitrary and against the weight of the evidence." When reviewing a hearing officer's findings for factual sufficiency of the evidence, we consider and weigh all the evidence and do not disturb such findings unless they are so contrary to the overwhelming weight of the evidence as to be wrong and unjust. Cain v. Bain, 709 S.W.2d 175,176 (Tex. 1986). It is the function of the hearing officer, as the fact finder, to judge the credibility of the witnesses, assign the weight to be given their testimony and the other evidence, and to resolve conflicts or inconsistencies raised by the evidence. We will not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by some evidence of probative value and are not against the great weight and preponderance of the evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The hearing officer's findings are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge